In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,
Appellants,

vs.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—
Criminal Division,
DORIS H. MAIER,
Assistant Attorney General—Writs Section,
ROBERT R. GRANUCCI,
Deputy Attorney General,
THOMAS A. BRADY,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-3628,
Attorneys for Appellants.

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JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Northern District of California, entered on February 2, 1973, enjoining the enforcement of certain rules promulgated by appellant Procunier, Director of the California Department of Corrections; this statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California has not yet been published in the official reports. A copy of the opinion is attached as Exhibit A.

JURISDICTION

This suit was brought as a class action on behalf of all inmates of penal institutions under the jurisdiction of the California Department of Corrections and its Director, defendant R. K. Procunier, under 42 U.S.C. section 1983, to enjoin the operation of certain rules promulgated by defendant Procunier, and for declaratory relief. The judgment of a three-judge panel of the district court was entered on February 2, 1973, and notice of appeal was filed in that court on March 1, 1973. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Younger v. Gilmore,* 404 U.S. 15 (1971); *Zemel v. Rusk,* 381 U.S. 1, 5-7 (1965).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to abstain from determining the constitutional validity of administrative rules promulgated by appellant, the

Director of the California Department of Corrections, when there existed a state statute, as yet uninterpreted, dealing with the subject matter covered by the rules and a means for state prisoners to judicially challenge the rules in question?

2. Whether the district court properly determined that institutional regulations dealing with general inmate correspondence, not including correspondence to and from attorneys, courts or public officials, may be subjected only to such regulations as are found by a federal court to be either "compelling" or "reasonable and necessary" to the advancement of some justifiable purpose of imprisonment?

3. Whether the constitution compels the State of California to accord to an unspecified class of non-attorneys acting on behalf of attorneys the full range of privileges accorded licensed attorneys in their meetings with their inmate-clients?

STATE PROVISIONS INVOLVED

The district court's opinion enjoined enforcement of sections 1201, 1205(e) and (f), and 2402(8) of the rules of the Director of Corrections, which are reprinted in footnotes 1-3 of the district court's opinion and the accompanying text. It also enjoined enforcement of Rule MV-IV-02 of the Director's Mail and Visiting Manual. This rule is reprinted at page xi of the opinion of the district court (see Exhibit A).

STATEMENT OF THE CASE

Appellees, on behalf of themselves and all other inmates at California penal institutions under the jurisdiction of the California Department of Corrections, filed an amended complaint in the United States District Court for the Northern District of California on July 6, 1972, challenging the constitutionality of certain regulations promulgated by Director Procunier. The amended complaint requested the convening of a three-judge court under the provisions of Title 28, United States Code, section 2281. This request was granted by Chief Judge Chambers of the Court of Appeals for the Ninth Circuit. Appellants then moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Appellees moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The motions were heard jointly and on February 2, 1973, the court issued an order denying appellants' motion to dismiss the complaint and partially granting appellees' motion for a summary judgment. This order enjoined enforcement of the above-mentioned regulations and directed appellants to formulate new regulations in their stead, subject to approval by the court, in accordance with the general guidance furnished in the court's opinion.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented herein are of importance to the administration of both the state prisons and the federal prison system. These questions concern the

instances in which a federal court may properly intervene in matters of state prison management and the proper application of the doctrine of abstention. Finally, there is the question of whether the Constitution compels the states to accord to persons other than attorneys the general right to confer confidentially with inmates in the same manner as attorneys, or whether the states retain the right to limit access to prisoners by private individuals.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONAL ISSUES.

The district court summarily rejected defendants' contention that the court should abstain from deciding the issues presented until the state courts had had an opportunity to pass on them. The district court apparently presumed that abstention would be proper only if the regulations themselves were unclear and could be authoritatively settled by a state court decision.

At all times here pertinent, there existed in California a statute dealing in some detail with the effect of a sentence of imprisonment in a state prison on the civil rights of a prisoner. This statute, California Penal Code section 2600, provides, *inter alia:*

> "This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

> . . . (4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

California has, at all times here pertinent, allowed prisoners access to the courts by means of a petition for a writ of habeas corpus in order to assert rights relating to the conditions of confinement, in addition to challenging the fact of confinement. See *In re Harrell*, 2 Cal.3d 675, 87 Cal. Rptr. 504 (1970). Thus, in *In re Jordan*, 7 Cal.3d 930, 103 Cal. Rptr. 849 (1972), the state supreme court entertained, and granted, habeas corpus petitions by prisoners who challenged the Director's rules with respect to mail between inmates and their attorneys on the ground that they deprived petitioners of rights guaranteed them by California Penal Code section 2600.[1]

The net result of the district court's refusal to abstain in the instant case is that, although the California legislature has enacted a statute specifically dealing with the rights and obligations of prison authorities and inmates with respect to correspondence

[1]These same rules were challenged on constitutional grounds in the complaint filed in the instant case. However, the district court dismissed this challenge as moot because the intervening decision in *In re Jordan* granted appellees the relief they requested.

to and from an inmate, and although the legislature has created a means whereby a prisoner may seek interpretation or invalidation of the rules of the Director of Corrections seeking to interpret the statute, these processes will apparently never be used since a federal court has allowed petitioners herein to bypass these state mechanisms entirely, has adjudicated their constitutional claims regarding the rules without reference to the state statute, and has retained jurisdiction over the matter to compel appellants to formulate new rules solely in accordance with the court's opinion.

Under such circumstances, we submit that abstention by the federal court was required. Abstention is permissible only in narrowly limited special circumstances which justify the delay and expense which application of the doctrine may entail. *Zwickler v. Koota,* 389 U.S. 241, 248 (1967). However, "(t)he paradigm case for abstention arises when the challenged state statute is susceptible to 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 510-511 (1972).

> "Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions . . . and premature constitutional adjudication." *Harman v. Forssenius,* 380 U.S. 528, 534 (1965), cited with approval in *Lake Carriers' Assn. v. MacMullan, supra* at 511.

Here the state enacted a comprehensive statute dealing with the subject of correspondence to and from inmates of state penal institutions. Nonetheless, that statute was bypassed and the federal court interpreted rules promulgated by the Director of the Department of Corrections, within the scope of his authority (see Calif. Pen. Code § 5058), without reference to the fact that there existed a state statute, as yet uninterpreted, which sought to regulate this field. For these reasons, we submit that the instant case is such a paradigm for application of the doctrine of abstention as was envisioned by the decisions of this Court discussed above, and that the district court's failure to apply that doctrine herein resulted in a substantial breach of the salutary purposes of that doctrine.

II

THE DISTRICT COURT APPLIED IMPROPER STANDARDS IN DETERMINING THE PROPRIETY AND PERMISSIBLE SCOPE OF FEDERAL INTERVENTION.

The district court's opinion notes that there is conflict among the cases regarding the standard which a federal court must apply in determining whether a state statute or state prison regulation violates the First Amendment rights of prisoners (Op. Exhibit A, pp. vii-viii). The court's opinion disregards this Court's admonitions in *Lanza v. New York,* 370 U.S. 139, 143 (1962), and *Price v. Johnston,* 334 U.S. 266, 285 (1948), that lawful incarceration brings about the withdrawal or limitation of many of the rights and

privileges accorded a free man and that such limitations may be justified by the considerations underlying our penal system. It also disregards the many cases holding that prison authorities have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights, see *e.g., Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969), and this Court's admonition in *Johnson v. Avery,* 393 U.S. 483, 486 (1969), that federal intervention is authorized only when paramount federal constitutional rights supervene.

There is also some conflict as to whether any regulation of inmate mail is proper. The vast majority of the reported cases hold that restrictions on the extent and character of prisoners' correspondence and examination and censorship thereof are inherent incidents in the conduct of penal institutions. See *e.g., Lee v. Tahash,* 352 F.2d 970, 971 (8th Cir. 1965); *Sostre v. McGinnis,* 442 F.2d 178, 199-201 (2d Cir. 1971), cert. denied, 404 U.S. 1049, and 405 U.S. 978. However, several recent cases have held that a state has no justifiable interest in censoring outgoing personal mail of inmates. *Guajardo v. McAdams,* 349 F.Supp. 211 (S.D. Tex. 1972); *Lamar v. Kern,* 340 F.Supp. 544 (W.D. Wis. 1972).

Thus, it appears that the lower federal courts at present hold widely diverging views regarding the scope and propriety of federal intervention in matters of internal prison regulation and, in particular, in the area of the limitations which a state may validly place

on non-legal mail to and from inmates. The district court's opinion herein notes two standards which the lower federal courts have applied in determining the propriety of state enactments. Other cases have employed various other balancing tests to determine whether such regulations are justified. See *e.g., Seale v. Manson,* 326 F.Supp. 1375, 1383 (D. Conn. 1971); *Baker v. Beto,* 349 F.Supp. 1263 (S.D. Texas 1972). The net effect of these many cases and differing standards is, we submit, total confusion as to the scope of a prisoner's First Amendment rights with respect to "non-legal" correspondence, conflict as to the extent to which prison officials may regulate the inmates' correspondence, and conflict as to the circumstances when federal courts may intervene in such matters and the standards they should apply in measuring the validity of such prison regulations. Thus, the questions herein presented concerning these matters are substantial and of wide importance to the administration of both the federal and state prisons and the maintenance of harmonious federal-state relations.

III

THE CONSTITUTION DOES NOT COMPEL THE STATES TO ACCORD NON-ATTORNEYS THE RIGHT TO CONFER CONFIDENTIALLY WITH PRISON INMATES.

The district court also enjoined enforcement of a prison rule limiting investigators for an inmate's attorney of record to no more than two persons, who must themselves be either state licensed investigators or members of the bar and must be designated in writing as investigators by the attorney of record. Appellants were ordered to replace this rule with one which was "less restrictive" and were advised by the court that "bona fide law students under the supervision of attorneys, or full time lay employees of attorneys" would constitute a reasonable group of potential investigators.

The basis for this decision appears to be that the rule in question violates appellees' right of reasonable access to the courts, which is guaranteed as against state action by the Fourteenth Amendment. It is clear that the courts, state or federal, have no general obligation to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. *Johnson v. Avery,* 393 U.S. 483, 488 (1969). The practice in most federal courts is to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court determines that an evidentiary hearing is warranted. *Id.* at 487. Similarly, no general right exists for the appointment of counsel to represent an indigent in a civil case.

28 U.S.C. § 1915; *United States ex rel. Gardner v. Madden,* 352 F.2d 792 (9th Cir. 1965). However, it has long been recognized that prisoners, as well as other persons, have a right of reasonable access to the courts. *Ex parte Hull,* 312 U.S. 546, 549 (1941). The question here presented calls for this Court to define more precisely the concept "reasonable access to the courts."

The rule in question does not deny inmates access to their attorneys. Nor does it impair the confidential relationship between an attorney and his client. Nor does it attempt to deny attorneys the opportunity to use the services of non-attorneys to aid them in their work. Nonetheless, the district court concluded that the rule, although designed to prevent the abuses found to exist when confidential communication between inmates and non-attorneys was permitted, was unconstitutional since the court found that a "less restrictive" rule could be drawn which would nonetheless satisfy the prisons' security needs.

Whatever may be the merits generally of the use of law students and non-student legal assistants or "paraprofessionals" for the performance of some functions previously performed by attorneys only, we submit that the Constitution does not compel the California state prisons to recognize such persons as attorneys for purposes of allowing them confidential communication with inmates. The classes of attorneys and licensed private investigators, which were recognized by the previous rule, are easily defined and identifiable classes. Both are subject to detailed li-

censing and regulatory statutes of the State of California. By contrast, it must be said that the use of law students and "paraprofessionals" by attorneys is still in an early stage of development in this country. Indeed, no clear definition of these terms was attempted by the district court. Nonetheless, appellants have been ordered to open the class of persons allowed confidential interviews with inmates to include some unspecified number of such persons.

The basis of the court's holding appears to be that allowing of confidential interviews of inmates by such persons could or would benefit attorneys by freeing them from the necessity of interviewing their clients and allowing them to concentrate on legal research and drafting and might also allow them to serve more clients. We submit that an inmate's constitutional right of access to the courts does not demand that the legitimate requirements of institutional security be subordinated to the convenience of an attorney, especially when nothing prohibits that attorney from visting and conferring with his client. We submit that the court's opinion departs from the correct definition of the term "reasonable access to the courts" and the correct standard to be applied in determining whether a particular prison regulation violates an inmate's right of reasonable access. Some years ago, another three-judge court, in an opinion which has been often cited in the intervening years, attempted to define the term "reasonable access to the courts" and the standard which a federal court must apply in determining whether this right has been violated:

> "In the context of this case, access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters. Whether or not in a particular case the access afforded is reasonable depends upon all the surrounding circumstances." *Hatfield v. Bailleaux,* 290 F.2d 632, 637 (9th Cir. 1961).

The court continued:

> "In this federal proceeding under the Civil Rights Act we are not concerned with the question of whether these purposes for the challenged regulations are salutary or whether the regulations provide an effective means of achieving such purposes. See Ex parte Hull, 312 U.S. at page 549, 61 S. Ct. at page 641. If the purpose was not to hamper inmates in gaining reasonable access to the courts with regard to their respective criminal matters, and if the regulations and practices do not interfere with such reasonable access, our inquiry is at an end. The fact, if it be a fact, that access could have been further facilitated without impairing effective prison administration is likewise immaterial.
>
> "This accords with the general principle that apart from due process considerations, the federal courts have no power to control or supervise state prison regulations and practices." *Id.* at 639-640 (footnote omitted).

Appellants respectfully urge this Court to adopt this approach.

Dated, San Francisco, California,
April 26, 1973.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—
Criminal Division,
DORIS H. MAIER,
Assistant Attorney General—Writs Section,
ROBERT R. GRANUCCI,
Deputy Attorney General,
THOMAS A. BRADY,
Deputy Attorney General,
Attorneys for Appellants.

(Exhibit A Follows)

Exhibit A

Exhibit A

In the United States District Court for the Northern District of California

CASE NO. C-71 543 ACW

Robert Martinez and Wayne Earley, et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed February 2, 1973]

MEMORANDUM OPINION DENYING DEFENDANTS' MOTION TO DISMISS AND PARTIALLY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before: Duniway, U. S. Circuit Judge; and Zirpoli and Wollenberg, U. S. District Judges

This suit is a class action brought on behalf of all inmates of penal institutions under the jurisdiction of the California Department of Corrections [CDC], challenging certain rules of statewide application relating to mail censorship and attorney-client interviews conducted by law students or other paraprofessionals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1343(3), 1343(4), 2201 and

2281, and 42 U.S.C. §1983. Plaintiffs seek declaratory and injunctive relief.

The action is presently before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and plaintiffs' motion for summary judgment. The record before the Court consists of the amended complaint, the moving papers of the parties, affidavits, depositions, interrogatories and admissions.

The amended complaint sets forth five separate claims for relief. Count I alleges that Director's Rules 1201, 1205(d) and (f), and 2402(8) violate the First and Fourteenth Amendments to the United States Constitution insofar as they restrict the permissible content of inmates letters to personal correspondents. Count II alleges that the rules set forth in Count I and §MV-I-02 of the Director's Mail and Visiting Manual violate the First, Sixth and Fourteenth Amendments as applied to correspondence between inmates and their attorneys. Count III alleges that Rule MV-IV-02 of the Director's Mail and Visiting Manual violates the Fifth and Fourteenth Amendments by permitting only licensed private investigators and members of the State Bar to interview inmates on behalf of the attorney of record. Count IV alleges that Rule 2402(10) which requires that an inmate obtain permission before sending registered or certified mail violates the First and Fourteenth Amendments. Count V raises an individual claim, alleging abuse of Rule 2402(13) in that plaintiff Martinez was not permitted to correspond with

his former co-defendant in order to secure an affidavit he hoped to use in challenging his conviction. The rule itself is not challenged.

Two counts of the complaint need not be considered by this Court. Count V deals only with an alleged abuse in the application of a director's rule; it does not question the validity of the rule itself. Accordingly, the issue is one that should be dealt with by a single judge district court. The second count this Court need not consider is Count IV. At oral argument the Court was informed by counsel for defendants that Director's Rule 2402(10) will be completely omitted from forthcoming revised regulations, and once these regulations are adopted the prisons will not restrict the use of registered and certified mail by prisoners. On the ground that this issue will soon be mooted, defendants asked that the Court not rule upon the validity of the present regulation. The Court, therefore, does not reach this question.

DEFENDANTS' MOTION TO DISMISS

In addition to the somewhat more specific arguments addressed to each count of the complaint, defendants raise two basic contentions in support of their motion to dismiss. First, they contend that the claims raised in the complaint involve questions of internal prison administration over which correctional authorities traditionally have wide discretion. *Smith v. Schneckloth,* 414 F.2d 680, 681 (9th Cir. 1969). The Supreme Court responded to a similar contention in *Johnson v. Avery,* 393 U.S. 483, 486 (1969):

> "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated."

Accord, Cruz v. Beto, 405 U.S. 319, 321 (1972). Hence, in alleging violations of inmates rights under the First, Fifth and Fourteenth Amendments, plaintiffs have stated a claim that this Court must consider.

Defendants' second contention is that even if jurisdiction is proper and a claim cognizable in federal court has been alleged, the Court should nevertheless abstain. Defendants admit that exhaustion of state remedies is not required under 42 U.S.C. §1983, but suggests that since equitable relief has been requested, the Court should defer to the California courts on the basis of comity. *Reetz v. Bozanich,* 397 U.S. 82 (1970).

In *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 509-10 (1972), the Supreme Court, as it had done before, specifically rejected the argument that the possibility a state court suit might result in a law being declared unconstitutional is not grounds for abstaining. Rather, abstention is proper only in the "narrowly limited 'special circumstances'" that exist when the state law could be interpreted in a manner that would render it constitutional. *Id., Zwickler v. Koota,* 389 U.S. 241, 248 (1971). "Where there is no

ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971).

Finally, defendants argue that regardless of the validity of the motion to dismiss the other claims, Count II must be dismissed, because the question raised was resolved in *In re Jordan,* 7 Cal. 3d 930, 103 Cal. Rptr. 849 (1972). The question raised is, as defendants argue, now moot, and defendants' motion to dismiss Count II is, therefore, GRANTED.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT: COUNT I

Plaintiffs challenge the following Director's Rules as infringing on their freedom of speech: Rule 1201 directs inmates not to "agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."[1] Rules 1205 (d) and (f) define contraband, as "any writings . . . expressing inflammatory political, racial, religious, or other views or beliefs. . . . which if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline."[2] Rule 2402(8)

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[1]D1201. INMATE BEHAVIOR. Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

[2]Rule D1205, Contraband, is revised as follows: . . .
d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's

provides that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate."[3]

These rules implement CDC's general policy towards prisoner mail, which is set forth in Rule 2401:

> "The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges."

The rules are enforced by mailroom staff and other employees of the prison who routinely read incoming and outgoing "personal"[4] mail of prisoners.

No standards, other than those contained in the rules set forth above, are furnished to the mailroom staff to help them decide whether a particular letter violates any prison rule or policy. If a letter is found

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possession is used to subvert prison discipline by display or circulation. . . .

f. Any writings or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates of institutions under the control of the Department of Corrections. Such material as may be contained in books, magazines, or newspapers which have been previously approved for receipt by inmates is excepted.

There is some indication that the definition of contraband will be changed in revised regulations to emphasize the purpose for which an item may be used, such as a weapon or escape plan, instead of retaining the present general description. See Procunier Deposition at 12.

[3]Rule 2402(8) has been altered since the amended complaint was filed. The present prohibition against "foreign matter" replaces a prohibition against "prison gossip or discussion of other inmates."

[4]For purposes of this opinion, "personal" mail is defined to be all mail other than correspondence with "any member of the State Bar, or holder of public office". Cal. Penal Code §2600(2).

to be improper correspondence, a CDC employee may take one or more of the following actions: (a) he may refuse to mail the letter and return it to the prisoner; (b) he may submit a disciplinary report, which may lead to suspension of the prisoner's mail privileges or to other, possibly more severe disciplinary punishment; or, (c) he may photocopy the letter and place it in the prisoner's permanent file where it will be available to classification committees, which determine housing and work assignments, and to the Adult Authority, which sets a date for the prisoner's parole eligibility.

Plaintiffs raise several challenges to these regulations, all based on the First Amendment. Before discussing them, however, it is appropriate to examine the applicability of First Amendment rights to prison inmates in more general terms. The majority of recent cases treating the problem have adopted the formulation of the court in *Corothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970): "[A]ny prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably [citations omitted] and necessarily [citations omitted] to the advancement of some justifiable purpose of imprisonment." *See Gray v. Creamer*, 465 F. 2d 179, 186 (3d Cir. 1972); *Wilkinson v. Skinner*, 462 F.2d 670, 671 (2d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Gates v.*

Collier, 349 F.Supp. 881, 896 (N.D. Miss. 1972); *Palmigiano v. Travisono,* 317 F.Supp. 776, 785 (D. R.I. 1970); *cf., Guajardo v. McAdams,* 349 F.Supp. 211 (S.D. Tex. 1972); *Brenneman v. Madigan,* 343 F. Supp. 128, 141-42 (N.D. Cal. 1972); *Burnham v. Oswald,* 342 F.Supp. 880 (W.D. N.Y. 1972); *Hillery v. Procunier,* ..... F.Supp. ..... C-71 2150 SW (N.D. Cal. 1972) (judgment vacated and temporary restraining order granted pending decision by three-judge court October 31, 1972); *Note: Prison Mail Censorship and the First Amendment,* 81 YALE L.J. 87 (1971). A few courts have required that the state show a compelling interest. *See, e.g., Morales v. Schmidt,* 340 F. Supp. 544 (W.D. Wis. 1972); *Fortune Society v. McGinnis,* 319 F.Supp. 901 (S.D. N.Y. 1970). *But see Baker v. Beto,* 349 F.Supp. 1263 (S.D. Tex. 1972). This Court need not decide between the "compelling" and "reasonable and necessary" tests since it holds that the regulations in question violate the First Amendment under either standard.

Plaintiffs correctly assert that the regulations in question are deficient in several respects. The regulations permit consoring of lawful expressions without any apparent justification. Phrases such as "defamatory", "otherwise inappropriate", "unduly complain", and "magnify grievances", include writings which are not obscene and do not present a clear and present danger to any justifiable state interest. Such writings are, therefore, protected by the First Amendment. No conceivable justification on the grounds of prison security necessarily requires such broad for-

mulation of censorship standards. Nor does it appear that defendant's legitimate interest in preserving internal discipline is served by applying these criteria to incoming mail.[5]

Moreover, assuming that the requirements of prison security justify censoring outgoing mail in some circumstances,[6] the regulations in question here are both vague and overbroad. Legitimate communications, though personally offensive to prison staff could be—and have been—censored on the grounds that statements in letters were "defamatory", or "otherwise inappropriate", or that they constitute undue complaints or magnified grievances. If censorship of outgoing personal mail is to continue, the regulations must be more narrowly and specifically drawn to prohibit only such communications as are obscene, and therefore not protected by the First Amendment, or as constitute a clear and present danger to the institution of its rehabilitation programs. Statements critical of prison life and personnel cannot be subject to censorship by the very people who are being criticized simply to stifle such criticism.

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[5]Defendant does not raise other potential justifications based on the recognized functions of prisons in America—deterrence of the individual and others from committing criminal acts, and rehabilitation of the individual. See *Morales v. Schmidt, supra*, 340 F.Supp. at 550. Such an argument would be futile, in any event, since the regulations in question would not appear necessary to further *any* of these functions.

[6]*Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972); *Lamar v. Kern*, 349 F.Supp. 222 (S.D. Tex. 1972); and *Morales v. Schmidt*, 340 F.Supp. 544 (W.D. Wis. 1972), have held that the state has no justifiable interest in censoring outgoing personal mail of inmates.

Plaintiffs further contend that the regulations in question are unconstitutional because they authorize punishment without giving "fair notice" of what is prohibited. See *Landman v. Royster,* 333 F.Supp. 621, 654-56 (E.D. Va. 1971). The punishment involved may include suspension of the right to send and receive personal mail, loss of privileges, or even a term in solitary confinement. The Court agrees with this contention as well.

Plaintiffs' final contention is that the Director's Rules do not provide any procedural safeguards against violation of prisoners' First Amendment rights through error or arbitrariness in censoring mail. The absence of safeguards undoubtedly stems from the premise of the mail regulations—mail is a privilege, not a fundamental right. Since we hold that prisoners' rights to correspond is a fundamental right protected by the First Amendment, and that restrictions on that right must be at least reasonably and necessarily related to a valid institutional interest, it follows that any regulations restricting prisoners' mail must be accompanied by the opportunity for review of decisions to censor or withhold mail. *See Guajardo v. McAdams, supra.* Without limiting the scope of such regulations, the following should, at a minimum, be provided for: (1) notice to the inmate that a letter has been disapproved, whether the letter be incoming or outgoing; (2) a reasonable opportunity for the inmate to contest a decision disapproving of an outgoing letter, and for an inmate's correspondent to contest a similar decision on an in-

coming letter; (3) review of complaints arising from censorship by an official of the prison other than the person who initially decided to disapprove a letter.

COUNT III

Administrative Rule MV-IV-02 provides in pertinent part:

> Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney.

Plaintiffs contend that this regulation effectively impedes access to the courts by imposing an unnecessary burden on prison inmates who cannot afford to pay for the services of licensed private investigators or attorneys. Most inmates are indigent and cannot even afford to pay their attorneys of record.[7] Yet interviewing inmates is frequently an essential part of understanding the basis for a civil rights complaint, a habeas corpus petition, or an appeal. *Stevenson v. Mancusi*, 325 F.Supp. 1028, 1032 (W.D.N.Y. 1971). If attorneys of record must interview their clients personally at the many CDC institutions, the time

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[7] "While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost nonexistent. Even for criminal proceedings, it is sparse." *Johnson v. Avery*, 393 U.S. 483, 493 (1969) (Douglas, J., concurring) (footnote omitted). *Cf. In re Tucker*, 5 Cal. 3d 171, 183 (1971); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493 (1970).

spent travelling would necessarily prohibit them from spending as much time working on legal problems.

Conversely, if attorneys can send assistants with detailed instructions to interview inmates, they will have more time available to evaluate the contentions raised and prepare the necessary legal documents. It follows that each inmate-client will receive better legal assistance, thus facilitating his access to the courts. Moreover, attorneys would have more time to serve additional clients who might otherwise have to rely on jailhouse lawyers.

The potential benefits to inmates, attorneys and the courts from permitting attorneys to send law students or other paraprofessionals to interview inmates are obvious. The use of paraprofessionals throughout the profession is becoming recognized as a means of improving legal services. The American Bar Association for example, recognizes such procedures in its new Code of Professional Responsibility.[8]

The fact that use of paraprofessionals would be beneficial, and perhaps essential in the prison context, to assuring an inmate reasonable access to the courts does not, however, provide a sufficient understanding of the problem to determine whether MV-IV-02 is constitutional. This Court has expressed the view

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[8] "A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Canon 3, Ethical Considerations 3-6. *See also* Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum.L.Rev. 1153 (1971).

that "prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner." *Gilmore v. Lynch,* 319 F. Supp. 105, 109 n.6 (N.D. Cal. 1970), *aff'd sub nom, Younger v. Gilmore,* 404 U.S. 15 (1971). The Supreme Court of California has similarly held that "the proper determination of [whether a given restriction is constitutional] in a particular case requires that we measure the *extent* of the restriction against the *need* for restriction." *In re Harrell,* 2 Cal.3d 675, 686 (1970). Factual criteria to be examined in making this determination are (1) the extent to which application of the rule impedes access to the court; (2) the extent of the threat presented by the conduct sought to be avoided by the particular rule from the standpoint of legitimate custodial objectives, and (3) the existence of reasonable alternative means of limiting the undesirable conduct which do not entail so significant a restriction on access to the courts. *In re Harrell, supra.*

The uncontested affidavit of Alice Daniel establishes that rule MV-IV-02 and the remoteness of most CDC institutions makes personal visits to inmate-clients so time consuming and inconvenient that attorneys are reluctant to make such visits. Inability to interview a client conveniently may affect an attorney's decision not to take the case, especially if the inmate is indigent and cannot pay for the attorney's expenses or time in making personal visits. When such a decision occurs, the inmate's ability to present

his case to the court necessarily suffers substantially from the absence of professional representation.

The conduct sought to be avoided by the adoption of MV-IV-02 in the fall of 1971 was visits to inmates by unlicensed investigators who posed a threat to prison security. Director Procunier testified in his deposition that "the real threat to security was that we were having visits from any one attorney [sic] that designated some people that we chose not to have in our institutions. That was generally the cause we found, that with some firms, they would designate anybody to be an investigator to get them in, people that we wouldn't allow in the institutions, so we tried to correct that and still be reasonable. The only way we could control it in my judgment would be to have them be licensed investigators." (Procunier Deposition, 24-25)

The Director's interest in preventing "undesirable" people from visiting inmates appears to be a reasonable concern for preserving prison security. But the means chosen to protect that interest are overbroad. In the present case, Ms. Daniel attempted to have a Hastings law student interview her client on her behalf, but was refused permission. Had the law student been participating in any of a number of law school programs under which students help inmates with their legal problems, instead of assisting a practicing attorney, he would have been permitted to interview the plaintiff. Moreover, he would not have undergone a security check other than to assure that he was enrolled in a school program.

In view of CDC's ability to satisfy security needs and still allow many law students access to inmates, it is apparent that a less restrictive regulation can be drawn to govern attorneys' use of law students or other paraprofessionals. Without intending to limit the Department's ability to experiment, the Court might suggest that bona fide law students under the supervision of attorneys, or full time lay employees of attorneys would constitute a reasonable group of potential investigators.

JUDGMENT

In accordance with Rule 56, Federal Rules of Civil Procedure, the Court adopts the foregoing opinion as its findings of fact and conclusions of law. It is the judgment of this Court that CDC Director's Rules 1201, 1205(d) and (f) and 2402(8) violate the First and Fourteenth Amendments to the Constitution. Rule MV-IV-02 violates the Fifth and Fourteenth Amendments. The Court therefore enjoins enforcement of these regulations insofar as they pertain to inmate mail and investigative interviews with qualified assistants of licensed attorneys.

The Court further orders that the defendants formulate new regulations in accordance with this opinion, and serve said regulations on plaintiffs' counsel and file them with the Court on or before March 1, 1973. Plaintiffs shall have until March 15, 1973 to respond to the proposed new regulations. The Court reserves jurisdiction of this lawsuit until properly formulated regulations have been adopted.

It is further ordered that Count II is dismissed as moot, and Count V be remanded to a single judge of this Court.

/s/ Ben C. Duniway
U. S. Circuit Judge

/s/ Albert C. Wollenberg
U. S. District Judge

/s/ Alfonso J. Zirpoli
U. S. District Judge